U.S. Department of Labor

Board of Alien Labor Certification Appeals
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DATE: November 10, 1999

CASE NO: 1999-INA-145

In the Matter of

BABULAL PARMAR
Employer

on behalf of

DEVIKA PARMAR
Alien

Appearances: Manuel M. Baculi, Esq.
For Employer and Alien

Certifying Officer: Rebecca Marsh Day, Region IX

Before: Huddleston, Jarvis and Neusner
Administrative Law Judges

DONALD B. JARVIS
Administrative Law Judge

DECISION AND ORDER

This case arises from Babulal Parmar's ("Employer") request for review of the denial by a U.S. Department of Labor Certifying Officer ("CO") of an application for alien labor certification. The certification of aliens for permanent employment is governed by section 212(a)(5)(A) of the Immigration and Nationality Act, 8 U.S.C. §1182(a)(5)(A), and Title 20, Part 656 of the Code of Federal Regulations ("C.F.R."). Unless otherwise noted, all regulations cited in this decision are in Title 20.

Under §212(a)(5) of the Act, as amended, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor is ineligible to receive labor certification unless the Secretary of Labor has determined and certified to the Secretary of State and Attorney General that, at the time of application for a visa and admission into the United States and at the place where the alien is to perform the work: (1) there are not sufficient workers in the United States who are able,

willing, qualified, and available; and (2) the employment of the alien will not adversely affect the wages and working conditions of the United States workers similarly employed.

An employer who desires to employ an alien on a permanent basis must demonstrate that the requirements of 20 C.F.R. Part 656 have been met. These requirements include the responsibility of the employer to recruit U.S. workers at the prevailing wage and under prevailing working conditions through the public employment service and by other means in order to make a good faith test of U.S. worker availability.

We base our decision on the record upon which the CO denied certification and the Employer's request for review, as contained in the appeal file ("AF"), and any written arguments. 20 C.F.R. §656.27(c).

Statement of the Case

On September 18, 1995, the Employer filed a Form ETA 750 Application for Alien Employment Certification with the California Employment Development Department ("EDD") on behalf of the Alien, Devika Parmar. (AF 163-164). The job opportunity was listed as "Cook, Domestic (DOT: 305.281.010)." (AF 163). The job duties were described as follows:

> Plan menu and cook meals for a household of Indian origin. Cook Indian (Gujarati and Punjabi) vegetarian dishes, dinners with major food being Tandoor recipes including breads, soups, sauces, [and] vegetables (no meat). Portion and garnish food.:[sic] Prepare dessert. Clean kitchen and cooking utensils and serve meals.

(Id.). The stated job requirements for the position, as set forth on the application, are two years experience in the job offered or two years in the related occupation of "Indian Chef." (Id.). Other special requirements were listed as "Able to perform the listed job duties." (Id.).

The CO issued a Notice of Findings ("NOF") on November 5, 1997, proposing to deny certification. (AF 35-39). First, the CO noted that Employer's household had not used a domestic cook before and that all parties concerned have the same family name. The CO questioned whether there was a genuine job opening, and /or whether the Employer could provide permanent, full-time employment to which U.S. workers can be referred, citing 20 C.F.R. 656.3. (AF 159). The CO instructed the Employer to provide evidence to establish the ability to provide permanent, full-time employment to a U.S. worker. (AF 159-160). Second, citing 20 C.F.R. 656.20(c)(8), the CO questioned the bona-fides of the application and found that the position is tailored to the unique experience of the alien and/or created for her and is therefore not clearly open to any qualified U.S. worker. (AF 160). In addition, the CO found that the requirement of cooking "Indian (Gujarati and Punjabi) vegetarian dishes" is not normal to the occupation and is considered a restrictive requirement and must be amended or justified based on business necessity. (AF 160-61).

The Employer submitted its rebuttal to the NOF on November 25, 1997, in the form of a rebuttal prepared by Employer's counsel, a letter written and signed by Employer and the Employer's tax returns, bank statements and pay stubs. (AF 116-157). The rebuttal statement listed the duties of the cook and a general schedule the cook will follow along with the number of meals the cook

would prepare on a weekly basis. The Employer stated that the cook will be required to cook three meals a day and at least two separate menus for each meal for a household of eight. Employer asserted that previously, no cook was hired because there was no need, however, the need for a cook arose when Employer moved into a bigger home and his household increased to eight members. Also, Employer stated that presently he has his social gatherings catered by outside caterers. (AF 124-125).

The CO issued a Final Determination ("FD") on April 8, 1998, denying certification. (AF 110-111). The CO found that Employer failed to submit convincing documentation that a permanent, full-time position exists to which U.S. workers can be referred. In addition, the CO found that Employer failed to address the finding that the job is created exclusively for the alien and that the alien has the same family name as the signatory. Furthermore, the CO found that Employer failed document a business necessity for the foreign cuisine requirement. For these reasons, the CO stated that she could not find that the Employer has a bona fide full-time domestic cook job to offer to the alien. (AF 111).

The Employer filed a Request for Reconsideration or in the Alternative Request for Review on May 1, 1998. (AF 1-109). The file was then forwarded to the Board of Alien Labor Certification Appeals ("BALCA") for review.

Discussion

The NOF questioned whether a current job opening exists to which U.S. workers can be referred and whether there was a genuine job opening. The CO found that the alien has the same family name as the Employer and questioned whether the job was created exclusively for the alien. The Employer was instructed to address these findings, among others, in his rebuttal.

The FD found that the Employer's rebuttal clearly failed to address the CO's finding that all parties concerned have the same family name. Section 656.25(e) provides that the employer's rebuttal evidence must rebut all the findings in the NOF and that all findings not rebutted shall be deemed admitted. On this basis, the Board has held repeatedly that an employer's failure to address a deficiency noted in the NOF supports a denial of labor certification. *Belha Corporation (Four Corners Importers)*, 1988-INA-24 (May 5, 1989) (*en banc*); *O.K. Liquor*, 1995-INA-7 (Aug. 22, 1996). Furthermore, Employer failed to carry the burden of proof to establish that a genuine employment relationship exists between Employer and the Alien and whether a bona fide job exists. *O.K. Liquor*, supra.

The record also supports the CO's determination that the requirement of two years experience cooking Indian vegetarian dishes is unduly restrictive and that Employer failed provide evidence to support that an applicant with two years of cooking experience could not readily adapt to a Indian style of cooking. However, in light of our holding that no bona fide job exists, it is not necessary to discuss these issues.

Accordingly, we find the CO's denial of certification was proper.

For the Panel:

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DONALD B. JARVIS
Administrative Law Judge

San Francisco, California